DEC 1 - 2015
OFFICE OF THE CLERK

No. 15-458

In the Supreme Court of the United States

ROCKY DIETZ,

Petitioner,

v.

HILLARY BOULDIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Jesse Beaudette
Counsel of Record
Paul N. Tranel
Bohyer, Erickson, Beaudette & Tranel, P.C.
283 West Front Street, Suite 201
P.O. Box 7729
Missoula, MT 59807
(406) 532-7800
jbeaudette@bebtlaw.com

Counsel for Respondent

Becker Gallagher Cincinnati, OH Washington, D.C 800.890.5001

QUESTION PRESENTED

Whether the trial court may recall the jurors for additional deliberations after the jury had been discharged, some of them had left the courtroom and one had made it to the first floor (from the second floor) when juror testimony established none of them had been subjected to outside influences during the time of discharge.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION 6

1. This Court recently denied the Petition for a Writ of Certiorari in *Jones v. Wagner* which presented the same issue 7

2. There is no circuit split as alleged by Petitioner 7

3. State court decisions are irrelevant to the question presented 16

4. Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Allapattah Servs. v. Exxon Corp.,
362 F.3d 739 (11th Cir. 2004) 7

Bahamas Agric. Indus., Ltd. v. Riley Stoker Corp.,
526 F.2d 1174 (6th Cir. 1975) 17

Brown v. Gunter,
562 F.2d 122 (1st Cir 1977) 17, 18

Erie R.R. v. Tompkins,
304 U.S. 64, 58 S. Ct. 817,
82 L. Ed. 1188 (1938) 16, 17

Hanna v. Plumer,
380 U.S. 460, 85 S. Ct. 1136,
14 L. Ed. 2d 8 (1965) 17

People v. Hendricks,
737 P.2d 1350 (Cal. 1987) 18

Putnam Resources v. Pateman,
958 F.2d 448 (1st Cir. 1992) 13

Summers v. United States,
11 F.2d 583 (4th Cir. 1926) *passim*

State v. Nash,
294 S.W.3d 541 (Tenn. 2009) 18

Thompson v. City of Bozeman,
945 P.2d 48 (Mont. 1997) 3

Tolan v. Cotton,
___ U.S. ___, 134 S.Ct. 1861,
188 L.Ed.2d 895 (2014) 19, 20

United States v. Figueroa,
683 F.3d 69 (3d Cir. 2012) *passim*

United States v. Marinari,
32 F.3d 1209 (7th Cir. 1994) *passim*

United States v. Rojas,
617 F.3d 669 (2d Cir. 2010) *passim*

Wagner v. Jones,
758 F.3d 1030 (8th Cir. 2014), *cert. denied*,
___ U.S. ___, 135 S. Ct. 1529,
191 L. Ed. 2d 558 (2015) *passim*

STATUTES

28 U.S.C. §§ 1861, et seq. 17

28 U.S.C. § 2072 17

RULES

Fed. R. Civ. P 49(b) 17

Sup. Ct. R. 10 6, 19

OTHER AUTHORITIES

Sanford Levinson, Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court, 79 Va. L. Rev 717 (1993) 7

H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1991) 8

STATEMENT

This case addresses the issue of whether a trial court may recall the jury for additional deliberation moments after it had been discharged when the evidence established no juror had been subjected to outside influences during the momentary period of discharge. This Court should deny the Petition on four grounds: (1) in March of 2015, this Court denied the Petition for a Writ of Certiorari in *Jones v. Wagner*, No. 14-615, which presented the same issue, (2) an analysis of case law establishes there is no split of authority between the circuit courts, (3) any conflicting decisions from state courts of last resort are irrelevant to the question presented in this case, and (4) Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law.

1. Petitioner was involved in a motor vehicle accident on August 9, 2009, in Bozeman, Montana. Resp. C.A. Brf. 1. Petitioner alleged low back pain with pain radiating into his left leg as a result of the accident. Respondent admitted liability for the accident but disputed causation and damages. *Id.* The evidence showed Petitioner had a long history of pre-existing severe, intractable low back pain. *Id.* at 2, 5-8. Petitioner was injured in October of 2008 in an elevator accident which resulted in severe low back pain with intermittent pain radiating into his left leg. *Id.* at 2, 8. Petitioner treated for several months before being discharged because the facility had nothing further to offer. *Id.* at 10.

After the accident at issue, Petitioner received physical therapy for approximately six weeks which resulted in 85% improvement of his pain. *Id.* at 11.

Petitioner did not seek any further treatment until the summer of 2010 when he received an epidural steroid injection and reported complete relief of his leg pain and significant reduction of his low back pain. *Id.* at 11-12. Petitioner did not seek any further treatment until July of 2011 when he underwent a few physical therapy visits. *Id.* at 13. Petitioner did not seek any further treatment prior to trial.

2. At trial, Petitioner's treating provider opined that his MRI findings were not related to the accident, the accident aggravated his pre-existing condition, did not cause his low back pain but caused his left leg pain. *Id.* at 13. Respondent's expert testified Petitioner's pre-existing condition was aggravated by the accident, his low back pain returned to baseline after the accident and his left leg pain was intermittent before the accident but ongoing after the accident. *Id.* at 3, 13-14. Prior to trial, Respondent admitted Petitioner was injured in the accident and stipulated to past medical expenses of $10,136. The only issue for trial was future damages. Pet. App. 2a.

During deliberations, the jury sent a note asking if Petitioner's medical expenses had been paid and, if so, by whom. Pet. App. 2a-3a. The jury's note resulted in the court speculating as to the meaning of the note:

> What I'm wondering – Let's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the

> argument and instructions, that their verdict may not be less than that amount?

Pet. App. 3a.

Respondent's counsel believed he made it "crystal clear" that they jury had to award at least the stipulated amount. *Id.* The court stated that it regretted not including an instruction as a matter of law stating the medical expenses set the minimum verdict amount. Transcr. 248-49. However, the court was also concerned that "... for some people, that sets the ceiling. I would like to avoid that." *Id.* at 249. The court responded to the jury's note in writing, informing it the information was not germane to its verdict. Pet. App. 2a; Transcr. 249. Counsel for both parties were satisfied with the court's handling of the note. *Id.*

The jury returned a verdict for Petitioner but awarded $0. Pet. App. 3a, 22a, 24a. The verdict was in violation of Montana law since liability for the accident was admitted and the parties had stipulated the past medical expenses were caused by the accident. *Thompson v. City of Bozeman*, 945 P.2d 48, 52 (Mont. 1997)(... where a jury fails to award any damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside). Neither party wished to poll the jury. Pet. App. 25a. The court informed the jury the matter was concluded, thanked them for their time, told them they were free to go and discharged them. *Id.*

The court stopped the jury moments after discharging them and discussed the matter with counsel since the verdict wasn't legally possible given

the stipulated damages. Pet. App. 26a, 29a-30a. Petitioner's counsel stated that he saw the jury speaking with the court's clerk, *id.*, but later stated he "thought" he saw the jurors speaking with the clerk although he was not suggesting there was any discussion about the case, *id.* at 27a. The court decided to send the jury back for further deliberations with further instruction. *Id.* at 28a-29a; Resp. C.A. Brf. 21. The court instructed the jury there was never any dispute that Petitioner's medical bills were caused by the accident and were due and payable. Resp. C.A. Brf. 21. The court instructed the jury the verdict had to be at least the amount of the past medical expenses, *id.*, plus some additional amount as compensation for Petitioner's undisputed injury, *id.* at 22.

Before giving the case back to the jury for further deliberation, the court specifically asked the jurors if any of them had talked to anyone during the period of discharge. Pet. App. 31a; Resp. C.A. Brf. 22. The jurors stated they had not talked with anyone. One juror stated that most of them were just outside the courtroom door. The juror who made it down to the first floor stated that he did not speak with anyone while discharged. The jury confirmed it had not been contaminated by any outside information during the discharge period. Pet. App. 31a; Resp. C.A. Brf. 22. After further deliberation, the jury returned a $15,000.00 verdict for Petitioner. Pet. App. 40a; Resp. C.A. Brf. 22. The court entered Judgment in favor of Petitioner in the amount of $15,000.00. Pet. App. 21a.

3. Petitioner appealed to the Ninth Circuit, *see* Pet. App. 1a-20a, where this was an issue of first impression, *id.* at 1a. The Ninth Circuit noted that a

jury is typically no longer an entity after it is discharged and its duties "are presumed to be at an end when its verdict has been rendered, received, and published." *Id.* at 6a (quoting *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926)). However, it was noted that several circuits have, in limited circumstances, recognized that a district court may recall a jury immediately after dismissal to correct an error in the verdict. *Id.* (citing *United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010); *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994)). It was noted that these cases look at the totality of circumstances to determine whether the jurors had been exposed to outside influences during the time of discharge. *Id.* The Ninth Circuit found this line of cases appeared to originate from *Summers*. *Id.*

The Ninth Circuit contrasted the *Summers* line of cases with *Wagner v. Jones*, 758 F.3d 1030 (8th Cir. 2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 1529, 191 L. Ed. 2d 558 (2015), and a handful of state courts, all of which had adopted a bright line test prohibiting recall once the jurors leave the courtroom. *Id.* at 9a. Although the Ninth Circuit recognized some advantages of a bright line rule, *id.* at 10a, it adopted the totality of the circumstances approach and held that "in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a. The Ninth Circuit concluded the

jury had not been subjected to outside influences and affirmed. *Id.* at 13a-17a.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States provides, in relevant part:

> **Rule 10. Considerations Governing Review on Certiorari**
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; ...,
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law

Petitioner argues this case presents a recognized circuit conflict, Pet. 2, 8, and that state courts of last resort are deeply divided on this issue, *id.* at 8. Contrary to Petitioner's argument, the Court should

deny the Petition. First, this Court recently denied a petition raising the same issue. Second, there is no conflict between the circuits which would merit this Court's review. Third, the decisions of state courts are irrelevant to the question presented. And fourth, Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law.

1. This Court recently denied the Petition for a Writ of Certiorari in *Jones v. Wagner* which presented the same issue

In *Jones*, Jones filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Pet. for Writ., *Jones, supra*. *Jones* presented the same issue as the case at bar. *Id.* at *5. Jones argued the Petition should be granted, *inter alia*, because the Eighth Circuit's decision created a conflict among the circuit courts. *Id.* at *19. Jones argued the Eighth Circuit's decision conflicted with decisions from the First, Second, Third, Fourth, Sixth and Seventh Circuits. *Id.* at *20. After this Court requested a response from Wagner, it denied the Petition. If this issue was not one that needed to be addressed in *Jones*, there is no additional reason to address it in the case at bar.

2. There is no circuit split as alleged by Petitioner

"The 'single most important' factor for granting certiorari petitions ... is a split within the circuits that have considered the issue below " *Allapattah Servs. v. Exxon Corp.*, 362 F.3d 739, 746 (11th Cir. 2004)(Tjoflat & Birch, JJ., dissenting)(citing *Sanford Levinson, Book Review: Strategy, Jurisprudence, and Certiorari.*

Deciding to Decide: Agenda Setting in the United States Supreme Court, 79 Va. L. Rev. 717, 726 (1993)(quoting *H.W Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991))).

Petitioner argues the Ninth Circuit's decision deepened a conflict among the circuit courts. Pet. 8. However, an analysis of the circuit court decisions shows there is no split between them. The seminal case on this issue is *Summers*, which announced the general rule: "After a verdict has been rendered, and the jury, after being discharged, have separated, the jury cannot be recalled to amend their verdict. But the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers*, 11 F.2d at 586 (quoting Abbott's Trial Brief, Criminal Causes, p. 730). *Summers* found that whether a jury is discharged depends on the actions of the jury more than the court's announcement of discharge. *Id.* The court provided:

> ... [The jury] may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

Id.

Summers held the jury could be recalled, further instructed and asked to further deliberate since the

jurors remained in the jury box, had spoken to no one and no one had spoken to them during the period of discharge. *Id.* at 586. *Summers* did not set forth any guidance as to when a jury remains an undispursed unit within the control of the court since the jury never left the jury box. Thus, the Fourth Circuit's decision in *Summers* is not in conflict with the Ninth Circuit's decision since it does not identify the boundaries of when a jury is considered an undispersed unit within the control of the court.

The Second Circuit looked at this issue in *Rojas*. 617 F.3d at 676-77 The jury found Rojas guilty of conspiring to possess, with intent to distribute, more than five grams of cocaine base. *Id.* at 671. In reading the verdict in open court, however, the deputy read "cocaine" but omitted "base" *Id.* at 673. The error was discovered after the jury had been polled, discharged and had returned to the jury room. *Id.* Over objection, the court brought the jury back to the courtroom and had the deputy re-read the verdict. *Id.* On appeal, the Second Circuit quoted the general rule set forth above from *Summers*. *Id.* at 677 The court went on to provide:

> It is significant that, although the jury had technically been declared "discharged" by the court, it had not dispersed. The jurors were therefore not exposed to "outside factors," which might "render[] the reliability of any poll on recall problematic." *United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994). In accord with the *Summers* court, the Seventh Circuit has held that "[w]hen a jury remains as an undispersed unit within the control of the court

> and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled." *Id.* at 1214. Similarly, we hold that the jury in this case "retain[ed] its function[]," *Summers*, 11 F.2d at 586, and that it was proper to return it to the courtroom for a re-reading of the verdict form and for a re-polling.

Id. at 678.

Even though the *Rojas* jury had left the courtroom and returned to the jury room, it was still considered undispersed and under the court's control without exposure to outside influences. Thus, it was proper to recall the jury. *Rojas* relied on *Summers* and quotes from *Marinari* in support of its holding, explicitly stating the decisions are in accord. This runs contrary to Petitioner's argument that the Fourth Circuit's decision in *Summers* is in conflict with decisions from the Second, Third and Seventh Circuits. Pet. 8. Further undermining Petitioner's argument is the Third Circuit's decision in *Figueroa*.

Figueroa was indicted on four counts: (1) distribution of heroin, (2) distribution of cocaine, (3) carrying a firearm during a drug trafficking offense, and (4) possession of a firearm by a felon. *Figueroa*, 683 F.3d at 71. At trial, the fourth count was bifurcated from counts 1-3. *Id.* The jury reached a verdict on counts 1 and 2 but deadlocked on count 3. *Id.* at 71-72. The verdicts were published and the jury was discharged. *Id.* at 72. Immediately on their exit, the prosecution asked the jury be held so count 4 could be addressed. The judge sent a court employee to hold the jury. *Id.* at 72. The judge ultimately recalled the

jury for consideration of count 4. The judge charged the jury on count 4 and it returned a guilty verdict. *Id.*

On appeal, the Third Circuit noted the pivotal inquiry is whether the jurors became susceptible to outside influences. *Id.* at 73. The court provided:

> "When a jury remains as an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled." *Marinari*, 32 F.3d at 1213 (citing *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926)); see also *United States v. Rojas*, 617 F.3d 669, 678 (2nd Cir. 2010)("It is significant that, although the jury had technically been declared 'discharged' by the court, it had not dispersed."). As the Fourth Circuit long ago stated, "the mere announcement of [the jury's] discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers*, 11 F.2d at 586 (citing Austin Abbott, A Brief for the Trial of Criminal Cases 730 (2d ed. 1902)).

Id.

The Third Circuit concluded the district court retained control of the jury at all times after discharge, the jury had not dispersed and the jury had not interacted with any outside individuals, ideas or coverage of the proceedings. *Id.* "Thus, the fact that the jury was momentarily released did not subject them to outside influence." *Id.* The Third Circuit held there was no error in reconvening the jury. *Id.* *Figueroa* shows uniformity of the rule adopted by the Second, Third, Fourth and Seventh Circuits and notes

the pivotal inquiry is whether the jurors have become susceptible to outside influences.

Susceptibility to outside influences addresses the issue of the protective shield surrounding the jury while hearing the case and deliberating. This protective shield aims to prevent jurors from being influenced by outside factors. *Id.* When the jury is discharged, the concern regarding outside influences ends because the proceedings and deliberation process can no longer be affected. *Id.* (citing *Marinari*, 32 F.3d at 1214 ("Of course, after discharge, the jurors are quite properly free to discuss the case with whomever they choose.")). The fact that the court removes the "protective shield" upon discharge does not mean the jury is immediately subjected to outside influences.

The Seventh Circuit addressed this issue in *Marinari*. The jury found Marinari guilty of conspiracy to distribute marijuana. *Marinari*, 32 F.3d at 1210. The verdict was read into the record and the judge instructed the jurors to return to the jury room. *Id.* at 1212. After the last juror exited the courtroom, Marinari requested the jury be polled. The judge denied the request while the jury remained in the jury room. Marinari moved for a new trial alleging the court erred in refusing to have the jury return to the courtroom to be polled. *Id.*

The resolution of Marinari's motion hinged on whether the jury had been discharged and dispersed. The court noted that a jury is undischarged and may be recalled when it remains an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others. *Id.* at 1214 (citing *Summers*, 11 F.2d at 586). The court also

noted that "[u]ntil the jury is actually discharged by separating and dispersing (not merely being declared discharged), the verdict remains subject to review. *Id.* (citing *Putnam Resources v. Pateman*, 958 F.2d 448, 459 (1st Cir. 1992)).

The court noted a long line of cases which demonstrated the practical reason why a verdict becomes final upon separation and dispersal of the jury - it is at that time that the jurors are exposed to outside contacts. *Id.* The Seventh Circuit concluded the jury had remained sequestered in the jury room awaiting security escort to the parking lot. *Id.* at 1215. The jurors had not dispersed, they remained untainted by any outside contact and they continued to exist as a judicial body under the control of the court. *Id.* The Seventh Circuit held it was error for the district court not to poll the jury under these facts. *Marinari* shows the Seventh Circuit applies the same analysis as the Second, Third, and Fourth Circuits.

In its decision below, the Ninth Circuit held that in limited circumstances, a court may recall a jury shortly after it has been discharged to correct an error in the verdict, but only after the court inquires to determine that the jurors were not exposed to any outside influences that would compromise its ability to fairly consider the verdict. Pet. App. 12a. The court's decision was supported by *Summers*, *Figueroa*, *Rojas* and *Marinari*. *Id.* at 6a-9a. The court contrasted the rule adopted in these cases with the Eighth Circuit's decision in *Wagner*, which "adopted a restrictive bright-line rule prohibiting recall once the jurors have left the confines of the courtroom." *Id.* at 9a. The Ninth Circuit noted a bright line rule has some advantages

but fails to adequately address the issue of outside influences. *Id.* at 10a-11a. The Ninth Circuit found the rule it adopted struck the proper balance between considerations of fairness and economy. *Id.* at 11a. Although the Ninth Circuit contrasted its holding with *Wagner*, an analysis of *Wagner* shows there is no split of authority on this issue.

Wagner asserted two constitutional claims at trial, political discrimination and equal protection. *Wagner*, 758 F.3d at 1032. During deliberations, the jury sent a note stating it was unable to reach a unanimous verdict for either party. *Id.* The judge convened the jury in the courtroom to question it about the note. *Id.* at 1032-33. Each juror confirmed his or her view as to the state of deliberations. *Id.* at 1033. The judge declared a mistrial, asked the jurors to complete and return a post-trial assessment and thanked them for their service. The judge excused the jurors and they retired from the courtroom at 4:35 p.m. *Id.*

After discharging the jury, the judge reassembled the previously dispersed jurors in the courtroom at 4:37 p.m. The judge asked if the jury was deadlocked on one or both counts. The foreperson informed the court the jury had reached a verdict on Count I but not Count II. The judge amended his previous mistrial ruling, limiting it to Count II, accepted the signed verdict on Count I and discharged the jury. Wagner moved for a new trial arguing the judge did not have the authority to reconvene the jury and accept the verdict after declaring a mistrial. *Id.*

Wagner held that, "in a case such as the present one, where a court declares a mistrial and discharges the jury which then disperses from the confines of the

courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts." *Id.* at 1035. Critical to the court's holding is the fact that there was no evidence of the jurors' conduct during the time of discharge. "From the time the magistrate judge discharged the jury and the members dispersed from the courtroom, until the time the magistrate judge reassembled them in the courtroom, we have no record of the jury members' location, supervision, contacts, communications or conduct, either as individuals or as a group." *Id.* at 1033, n. 5. The court found the *Summers* rule and its variations become unworkable when there is no evidence as to juror security and conduct after discharge, which would force the court to speculate as to the undefined limits of the protective shield. *Id.* at 1035-36.

Wagner, like *Summers*, *Rojas*, *Figueroa*, *Marinari* and the Ninth Circuit's decision below, allows a jury to be recalled, in limited circumstances, once discharged. Thus, all the circuits are following the same rule. *Wagner*, however, had to narrow its ruling and adopt a bright line rule since it had no evidence to determine whether the jury was subjected to outside influences during the time of discharge. This prevented the Eighth Circuit from following the same analysis as the other Circuits since it had no evidence to analyze. The Eighth Circuit had to adopt the bright line rule by default. The fact that *Wagner* adopted a bright line rule at the courtroom door based on the facts before it does not create a conflict between the Circuits. They all follow the same rule, that a jury may be recalled, in limited circumstances, once discharged.

The *Wagner* decision is also distinguishable from the *Summers* line of cases in that the court had declared a mistrial before discharging the jurors. *Id.* at 1033. Even *Wagner* recognized this distinction, noting that it was not entirely convinced the other circuits would condone recalling a jury to question and re-poll it after a mistrial had been declared. *Id.* at 1036, n. 10. *Wagner* is limited to the situation where a mistrial has already been declared. Thus, it does not create a split of authority between the Circuits.

3. State court decisions are irrelevant to the question presented

Petitioner argues that state courts of last resort are intractably divided on the question presented, with the clear majority of state courts to decide the issue adopting a bright line rule similar to the Eighth Circuit's. Pet. 14. "As matters currently stand, therefore, judges across the country are subject to inconsistent rules concerning the circumstances under which they are permitted to recall discharged jurors." Pet. 15. This argument is obviously being asserted to convince this Court that a significant conflict exists which can be remedied if this Court grants the Petition. Whether state courts of last resort have adopted differing rules, however, is irrelevant to the question presented in this case.

Unless dealing with matters governed by the U.S. Constitution or an Act of Congress, a federal court sitting in diversity jurisdiction must apply the law of the state, whether such law is declared by the Legislature or the state's highest court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 1194 (1938). Congress has no power to declare

law for any state and the Constitution does not confer any such power on the federal courts. *Id.* Although federal courts apply a state's substantive law, they apply federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 1141, 14 L. Ed. 2d 8, 13 (1965); *see* 28 U.S.C. § 2072 (Supreme Court shall have the power to prescribe general rules of practice and procedure for cases in the United States district courts (including proceedings before magistrate judges) and courts of appeals). Matters related to the selection and conduct of the jury are controlled by federal procedural law, 28 U.S.C. §§ 1861 et seq., including the judge's ability to reject a jury's verdict and have it continue deliberations under Fed. R. Civ P 49(b). *Bahamas Agric. Indus., Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1183 (6th Cir. 1975).

In the case at bar, its irrelevant if there are 50 different rules from the states since the question presented is one of federal procedure. If this Court granted the Petition and issued a ruling, it would only be binding on the federal courts and would have no effect on the law established in each state. A decision from this Court only effects a state court's ruling when the Constitutionality of the state's ruling is at issue. *See Brown v. Gunter*, 562 F.2d 122, 123-24 (1st Cir. 1977)(federal court has no power to challenge decision by Massachusetts Supreme Judicial Court that recall of jury after discharge was proper; it is accepted as correct rule of law in Massachusetts and only issue properly before federal court is whether such rule is consistent with requirements of the United States Constitution).

In *Brown*, the issue was whether the recall of the jury after discharge in a criminal case violated the Double Jeopardy Clause of the Fifth Amendment or the right to a jury trial guaranteed by the Sixth Amendment. *Id.* at 124. Although these Amendments are contained in the United States Constitution, the states are bound by them through the Fourteenth Amendment's Due Process Clause. *Id.* In the case at bar, the question presented does not raise a Constitutional issue that would have any effect on state court decisions. The question presented is strictly one of federal procedural law. Therefore, the fact that states may adopt different rules has no bearing on the question presented in this case.

Petitioner goes on to argue that the question whether a judge can recall a discharged jury directly implicates the "'fundamental guaranty of a fair trial' as embodied in the constitutional right to a jury trial as well as the broader right to due process." Pet. 16 (citing *State v. Nash*, 294 S.W.3d 541, 553 (Tenn. 2009) and *People v. Hendricks*, 737 P.2d 1350, 1358 (Cal. 1987)). These cases, however, do not support Petitioner's argument given the question presented in this case. *Nash* and *Hendricks* were criminal matters. *Nash*, 294 S.W.2d at 543; *Hendricks*, 737 P.2d at 1352. Therefore, the Fourteenth Amendment's Due Process Clause required the protections of the United States Constitution. The same protections are not at issue in the case at bar since we're dealing with a civil case. Therefore, the fact that state courts of last resort may have adopted conflicting rules of law does not have any relevance to the question presented in the case at bar.

4. Petitioner is seeking to correct the Ninth Circuit's alleged misapplication of a properly stated rule of law

Petitioner identifies the question presented as "[w]hether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case." Pet. (I). What Petitioner is really seeking from this Court is a reversal of the Ninth Circuit's decision based upon its application of the uniform rule of law to the facts of the case. This is evident from the Petitioner's arguments. "Under the Eighth Circuit's rule, this case would plainly have come out the other way, because the judge had discharged the jury and the jurors had left the courtroom before the judge recalled them." Pet. 10. "Under the Fourth Circuit's rule, therefore, this case plainly would have come out the other way as well, because the jurors had left the courtroom (and mingled with non-jurors outside the judge's control) before the judge recalled them." Pet. 11.

Petitioner hides this argument under the guise of a conflict between the circuits since a writ of certiorari is, by rule, rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Rule 10, Rules of the Supreme Court of the United States. This Court's reluctance to grant certiorari in cases in which the law is clear but allegedly misapplied to the facts was set forth in *Tolan*:

> I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e.g.*, this Court's Rule 10

> ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the ***misapplication*** of a ***properly stated rule of law***"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3) (10th ed. 2013)("[E]rror correction is outside the mainstream of the Court's functions and not among the 'compelling reasons' that govern the grant of certiorari").

Tolan v. Cotton, ___ U.S. ___, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895, 903-04 (2014)(emphasis original)(Alito & Scalia, JJ., concurring).

The concurring opinion in *Tolan* further noted that circuit courts are regularly called upon to determine whether the evidence supports the grant of summary judgment and that "[t]here is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here." *Id.* at ___, 134 S. Ct. at 1868-69, 188 L. Ed. 2d at 904. In the case at bar, the Circuit Courts are all following the same rule, that a discharged jury may be recalled after it is discharged if it remains an undispersed unit, within the control of the court, with no opportunity to mingle with or discuss the case with others. The fact that the Ninth Circuit applied the rule in a broader fashion than the Eighth Circuit may apply the rule does not create a conflict; it creates an argument that the Ninth Circuit misapplied the properly stated rule of law. This Court should deny the Petition since it is only being asked to review the Ninth Circuit's application of the

law to the facts, not resolve a conflict in the law between the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jesse Beaudette
Counsel of Record
Paul N. Tranel
Bohyer, Erickson, Beaudette & Tranel, P.C.
283 West Front Street, Suite 201
P.O. Box 7729
Missoula, MT 59807
(406) 532-7800
jbeaudette@bebtlaw.com

Counsel for Respondent